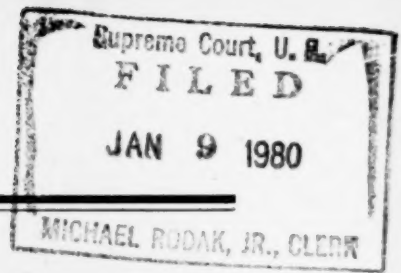


No. 79-650



In the Supreme Court of the United States

OCTOBER TERM, 1979

HERMINIO CRUZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The judgment of the court of appeals was entered on August 17, 1979, and a petition for rehearing was denied on October 2, 1979. The petition for a writ of certiorari was filed on October 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner's voluntary oral statements to DEA agents should have been suppressed because petitioner declined to sign a "waiver of rights" form before seeing a lawyer.

(1)

2. Whether the affidavit supporting a search warrant for petitioner's house established probable cause.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of possessing heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was fined \$25,000 and sentenced to a 15-year term of imprisonment.¹ The court of appeals affirmed.

In December 1976, Jose De Leon of Chicago, Illinois, called Rafael Kercado-Rivera in Springfield, Massachusetts, and arranged to sell him a kilogram of heroin.² On December 16, 1976, Kercado-Rivera and an accomplice named Daisy Gonzales met with De Leon in a house in Chicago. Minutes later, DEA agents saw De Leon leave that house carrying a brown paper bag and travel to petitioner's house. When he returned to the house in which Kercado-Rivera and Gonzales were waiting, he was carrying a white paper bag. Kercado-Rivera and Gonzales thereafter flew back to Hartford, Connecticut, where

¹ Petitioner was subsequently convicted on drug related charges in the United States District Court for the District of Massachusetts and was sentenced to another 15-year term of imprisonment, to run concurrently with the sentence imposed in this case. On October 9, 1979, the Court denied petitioner's petition for a writ of certiorari regarding his conviction in the District of Massachusetts. See *Cruz v. United States*, No. 78-1504.

² This conversation was monitored by DEA agents pursuant to a court-ordered wire interception.

DEA agents arrested and searched them, discovering a white paper bag containing a kilogram of heroin (Pet. App. 2a-3a; S.H. Tr. 88-113, 117-119, 123).

Information concerning the arrests and seizure in Connecticut was sent to DEA agents in Chicago, who promptly obtained a warrant to search petitioner's house. The agents executed the warrant that same evening. Upon entering the house, the agents placed petitioner in protective custody and asked him some preliminary questions. Petitioner confirmed that the house was his. In the search that ensued, the agents found more than 3.8 kilograms of heroin, drug paraphernalia, and a brown paper bag containing \$29,000 (Pet. App. 2a-3a; S.H. Tr. 17-18, 27, 88-89, 117, 161).

The agents arrested petitioner, informed him of his *Miranda* rights, and asked him to sign a waiver of rights form. Petitioner stated that he understood his rights but that "he would not sign any documents unless his lawyer was present" (S.H. Tr. 401, 413-415). The agents then advised petitioner that they wished to question him, that he was entitled to have his lawyer present, that he did not have to answer any questions until he consulted with his lawyer, and that he could stop the questioning at any time. Petitioner again acknowledged that he understood his rights and immediately thereafter he admitted that the heroin found in his home was his (Pet. App. 4a; S.H. Tr. 400-402, 413-415; Tr. 65-67, 112-113; Gov't Ex. 8).³

³ Petitioner did not testify at the suppression hearing. At trial, however, he claimed that he had never been informed

ARGUMENT

1. Petitioner contends (Pet. 22-24, 28-37) that, in light of his refusal to "sign any documents unless his lawyer was present" (S.H. Tr. 401), the courts below erroneously concluded that he voluntarily and knowingly waived his *Miranda* rights.⁴ But, as this Court made clear in *North Carolina v. Butler*, No. 78-354 (Apr. 24, 1979), slip op. 2-7 & n.5, the fact that petitioner refused to sign a waiver form does not preclude a finding of voluntary waiver. Such behavior "may indicate nothing more than a reluctance to put pen to paper under the circumstance of custody. A detainee may still wish to discuss the matter with his detainers for any number of reasons * * *." *United States v. McDaniel*, 463 F.2d 129, 135 (5th Cir. 1972), cert. denied, 413 U.S. 919 (1973); see, e.g., *United States v. Gardner*, 516 F.2d 334, 341 (7th Cir. 1975). Here, the record demonstrates that the officers twice informed petitioner of his rights, that petitioner stated that he understood those rights, and that petitioner nonetheless chose to admit his guilt.⁵

of his rights and that he had never admitted that he owned the heroin (Tr. 204, 293, 303).

⁴ Although petitioner arguably suggests that his Sixth Amendment right to counsel was also violated, that right "attaches only at or after the time that adversary judicial proceedings have been initiated against" the defendant. *Kirby v. Illinois*, 406 U.S. 682, 688 (1972); *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

⁵ Petitioner also claims (Pet. 33-37) that the district court improperly charged the jury regarding the admissibility of

As petitioner points out (Pet. 22-24), there is a conflict among the courts of appeals as to whether a suspect who has previously invoked his Fifth Amendment right to counsel, but has not yet consulted an attorney, may ever waive his rights in response to custodial questioning. Compare, e.g., *United States v. Rodriguez-Gastelum*, 569 F.2d 482 (9th Cir.) (en banc), cert. denied, 436 U.S. 919 (1978); *United States v. Grant*, 549 F.2d 942 (4th Cir.), cert. denied, 432 U.S. 908 (1977); and *United States v. Tafoya*, 459 F.2d 424, 427 (10th Cir. 1972), with *Nash v. Estelle*, 597 F.2d 513 (5th Cir. 1979) (en banc) and *White v. Finkbeiner*, 570 F.2d 194 (7th Cir. 1978).⁶ That issue is not presented here, however, because petitioner never invoked his right to the presence of counsel. Rather, he stated only that he would not sign any documents unless advised by counsel. When the officers then asked petitioner whether he also

his confession. See 18 U.S.C. 3501. Petitioner initially submitted a different instruction on this point, but he expressly approved the instruction that was ultimately given (Tr. 263) and cannot now be heard to complain. In any event, the instruction adequately informed the jurors that they should consider his admission only after determining "whether he made those statements and, if so, whether he made them voluntarily and understandingly" (Tr. 388-389). Although the trial court properly instructed the jury that the government had to prove petitioner's guilt beyond a reasonable doubt (Tr. 389), no such burden exists with regard to the voluntariness of petitioner's confession. See *Lego v. Twomey*, 404 U.S. 477 (1972).

⁶ See also *Brewer v. Williams*, *supra*, 430 U.S. at 404-405 & n.11; *Michigan v. Mosley*, 423 U.S. 96, 101 n.7 (1975); *Maglio v. Jago*, 580 F.2d 202, 205-206 (6th Cir. 1978).

wanted counsel present before answering questions, petitioner indicated that he understood his rights and that he wished to make a statement. In these circumstances, the courts below properly found that petitioner had waived his rights (see, e.g., *Nash v. Estelle*, *supra*, 597 F.2d at 517-520; *United States v. Rodriguez-Gastelum*, *supra*, 569 F.2d at 484 n.2), and further review of this essentially factual question is not warranted.⁷

2. Petitioner also argues (Pet. 38-40) that the affidavit supporting the search warrant misrepresented the nature of the confidential informant and the identity of one of petitioner's co-defendants. Pe-

⁷ In *United States v. Priest*, 409 F.2d 491 (5th Cir. 1969), the court of appeals concluded that the defendant, a 19-year old boy of limited education who was recuperating in a hospital, had expressly requested counsel when he stated that "he did not want to sign the [waiver] form until he had consulted with an attorney." 409 F.2d at 492 (emphasis supplied). The court therefore held that the confession that was thereafter extracted during interrogation in the hospital room was inadmissible. Here, in contrast, petitioner merely stated that he would not sign any document unless he consulted with an attorney, and, after he was again warned of his rights, he immediately made an inculpatory statement. In light of the difference in statements and circumstances between this case and *Priest*, and the recent decision of the en banc Fifth Circuit in *Nash v. Estelle*, *supra*, it seems likely that the Fifth Circuit would agree with the decision of the court of appeals in this case.

In any event, given the discovery of almost nine pounds of heroin in petitioner's house and the sale of heroin that had previously been observed, the admission of petitioner's statements was probably harmless error if it was error at all. See, e.g., *United States v. Charlton*, 565 F.2d 86, 91-93 (6th Cir. 1977); *Null v. Wainwright*, 508 F.2d 340 (5th Cir.), cert. denied, 421 U.S. 970 (1975).

tioner contends that if these allegedly false portions of the affidavit were excised, then the redacted affidavit would not "support a finding of probable cause." See *Franks v. Delaware*, 438 U.S. 154, 172 (1978). The district court and the court of appeals specifically held, however, that the misstatements were immaterial and unintentional (Tr. 373; Pet. App. 3a), and there is no reason to review these concurrent factual findings. See *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967).

In any event, there is no merit to petitioner's claims. The affidavit did incorrectly refer to co-defendant De Leon as co-defendant Kercado-Rivera, but the mistake was an understandable one given the conditions of surveillance and the looks of the two individuals (Pet. App. 3a). Furthermore, that misidentification was completely immaterial to the issuance of the search warrant, since in either case the agents had seen one of the co-defendants pick up a package later found to contain heroin at petitioner's house. Similarly, the fact that the main affidavit described a wire interception as a confidential informant was also immaterial.⁸ In addition, the agents filed a supplemental affidavit informing the magistrate that the informant was in fact court-authorized electronic surveillance (Pet. App. 12a).⁹

⁸ That mistake did not exaggerate the degree of probable cause that actually existed, because the reliability of information obtained from a wire interception is at least as great as the reliability of an informant.

⁹ Insofar as petitioner attempts (Pet. 40-44) to challenge the interception on other grounds, we note that he was not

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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a party to the intercepted conversation nor the object of the intercept order; he therefore has no standing to raise these claims. 18 U.S.C. 2510(11); 2518(10)(a). See *Alderman v. United States*, 394 U.S. 165, 176 (1969); *United States v. Williams*, 580 F.2d 578, 582-587 (D.C. Cir. 1978); *United States v. Fury*, 554 F.2d 522, 525-527 (2d Cir.), cert. denied, 433 U.S. 910 (1977); *United States v. Plotkin*, 550 F.2d 693, 695 (1st Cir.), cert. denied, 434 U.S. 820 (1977); *United States v. Calhoun*, 542 F.2d 1094, 1097-1098 (9th Cir. 1976), cert. denied, 429 U.S. 1064 (1977).